Lampi LLC *and* International Brotherhood of Electrical Workers, AFL–CIO, Local 558. Case 10–CA–29531

November 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On February 17, 1998, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party Union filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

Contrary to our dissenting colleague, we find that the Respondent discharged employee Connie Neely because of her union activities and her adverse testimony in a prior Board proceeding.[2] Thus, we agree with the judge, for the reasons he stated, that the Respondent violated Section 8(a)(3), (4), and (1) of the Act by discharging employee Connie Neely on August 5, 1996.

It is undisputed that Neely was an open and known union supporter during the Union's organizing campaign in late 1994. On the election day, January 12, 1995, Neely wore 12 union buttons on her blouse. Thereafter, during the hearing in the prior case, Neely testified that the Respondent's operations manager, Morris Overbeck, had coercively interrogated her. The judge in that case specifically credited Neely's testimony regarding the conversation in finding, inter alia, that the Respondent had violated Section 8(a)(1) of the Act.

There is also ample evidence, as the judge found, of the Respondent's animus towards its employees' union activities. Thus, the Board adopted the judge's findings in the prior case that the Respondent had violated Section 8(a)(1) of the Act by maintaining a rule that employees may not discuss wages, by coercively interrogating Neely and another employee, and by granting a wage increase in order to influence the union election.[3] We further note that, during a television interview in August 1996, the Respondent's president, Heike Holderer, stated on camera: "We don't particularly like unions" and the Respondent is "against them" because they do not benefit employees and would interfere with the Respondent's "direct interaction with our employees." The Board has held that an employer's expression of antiunion comments similar to those of the Respondent's here, while not themselves violative of the Act, nevertheless did establish animus towards its employees' union activities. *Gencorp,* 294 NLRB 717 fn. 1 (second paragraph), 720, 731 (1989) (antiunion animus established by, inter alia, employer's statement of union-free philosophy in its employee handbook).

In finding evidence of the Respondent's animus here, we also rely on Neely's credited testimony that during her discharge interview Virgie McKenzie, Neely's immediate supervisor, asked whether she had spoken with "Alice" lately. As the judge found, McKenzie clearly was referring to Alice Sullivan Young, a former union activist who had quit the Respondent's employ. Because Neely's testimony in the earlier case also related to an allegation that the Respondent had unlawfully disciplined Young,[4] we find that McKenzie's reference to Young euphemistically alluded to Neely's protected activities, and, as the judge found, thereby informed Neely that the Respondent was discharging her for these reasons.

Significantly, Neely's discharge, on August 5, 1996,[5] occurred only about 11 weeks after the judge's decision issued in the prior case. The judge's decision undoubtedly remained fresh in the Respondent's mind. Indeed, the Respondent posted an announcement on its bulletin board informing employees that it intended to appeal those adverse findings. Thus, based on the Respondent's knowledge of Neely's activities, the evidence of its antiunion animus, and the timing of the events in this case, we find that the General Counsel has established a prima facie case of discriminatory motivation.

We concede, as our colleague points out, that Neely had exhibited various shortcomings as an employee during 1996: her production ratings fluctuated between 87 and 95 percent from February through May; she had failed, in June and July, to meet the minimum 90-percent standard first established in May; and she had received two "verbal warnings" in July apart from production standards. We nonetheless agree with the judge that the Respondent failed to establish that it would have discharged her in August had she not engaged in protected activities.

To establish an affirmative defense under *Wright Line* to a discriminatory discharge allegation, an employer must do more than show that it had reasons that *could* warrant discharging the employee in question. It must show by a preponderance of the evidence that it *would* have done so even if the employee had not engaged in

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] 322 NLRB 502 (1996).

[3] The Board further concluded that the Respondent's wage increase had interfered with the election in the representation case and directed a second election which has not yet been held.

[4] No exceptions were filed to the judge's dismissal of that 8(a)(3) allegation.

[5] All dates are in 1996, unless otherwise noted.

protected activities. In assessing whether the Respondent has established this defense regarding Neely's discharge, we do not rely on our views of what conduct should merit discharge. Rather we look to the Respondent's own documentation regarding Neely's conduct, to its "Personnel Policy" handbook, and to the evidence of how it treated other employees with recorded incidents of discipline.

The Respondent's record of the reasons for the Neely termination stated: "Policy # 2.2.9 Failure to perform job assignment." Below this, 2 monthly performance efficiency ratings were set out: "June efficiency 86.62; July efficiency 68.95." Yet there is nothing in either the personnel policy handbook or otherwise in the record to suggest that failure to meet the new 90-percent standard for a month or even 2 months automatically or inevitably resulted in discharge.[6] The handbook text on Policy 2.2.9 "Failure to perform a job assignment" states: "An employee can be disciplined for carelessness, unsatisfactory work, or neglect of duty." It lists as the possible punishments: "Counseling/Verbal or written warning/suspension or Counseling/discharge." It does not require that any of these particular dispositions be given for a specified decline in production. Operations Manager Overbeck, when testifying about notations made on a list of employee efficiency ratings for June, explained that there were warning notations next to some employees' names but not next to Neely's because the Respondent had decided that during the first month of the new standard, a rating that exceeded 80 percent would not call for *any* kind of warning to the employee.that month, and Neely exceeded that rating.[7] A list drawn up in early August showing the employee ratings for both June and July included several instances of employees who, like Neely, failed to make the 90-percent standard in July and who, at least according to the written record, did not fall within exceptions that effectively excused a failure to meet the standard.[8] Unlike her, those employees were not terminated. Thus, for example, employee Benefield was shown with a rating of less than 80 percent in both June and July, with only a "warning" given to her; employee Tuck had a rating of less than 60 percent during both months, and was given a "final warning." Employee Sanders failed to make the 80-percent rating in June and failed to make the 90-percent rating in July, but her name had the notation "Warning 2nd—Move to faster person." While Belinda Lowe and Ginger Loudermilk, both with low ratings, were shown as terminated, their overall records were not comparable to that of Neely, so their discharges in no way established that Neely's discharge was inevitable.[9]

Perhaps recognizing that the written reasons for the discharge would not stand up, Manager Overbeck stated that Neely's whole record was considered in making the decision. Presumably he was trying to bring Neely's case within Section 2.1.3 of the Personnel Policy handbook which states that "A third or fourth infraction, as well as a severe infraction *may* lead to discharge" (emphasis added). Neely had received written records of "verbal warnings" for safety in August 1995, and, in July 1996, for absenteesim and for a failure to put UPC bar codes on two lamps. Although Overbeck tried to suggest he might have considered some absenteeism warnings Neely had received in previous years, the judge reasonably concluded this was not part of the discharge decision because Overbeck also testified that absenteeism was, at that time, calculated only on a calendar year basis. The fact that the August 1995 and July 1996 incidents were recorded as "verbal warnings" is significant, because the Respondent's handbook states: "A light offense will be disciplined with a verbal warning." More severe conduct could merit a "written warning." Thus, according to the Respondent's own handbook and disciplinary records, it did not regard Neely's two July incidents as other than "light" offenses. [10]

[6] We note that the handbook had been recently revised, with the revision "effective June 1996," the same month in which the phasing in of the new 90-percent minimum production standard began.

[7] The failure to indicate a warning of any kind to Neely also indicates that her efficiency ratings for previous months were not being held against her.

[8] There appeared to be no established list of exceptions that would excuse an employee from meeting the standards any given month. Overbeck testified to exceptions for, e.g., new employees, pregnant employees, old employees moved to new department, on the basis of handwritten notations he had made on the production efficiency reports for June and July. The testimony clearly indicated an ad hoc approach to the creation of exceptions, and the judge not unreasonably questioned the Respondent's failure to consider at all the serious illness of Neely's mother (whose hospitalization in July was admittedly known to Supervisor McKenzie) and Neely's distress over what she perceived as sexual harassment by a fellow employee. As the judge noted, the 2 days in July on which her production was abnormally low, were the day she reported the harassment and the following day. We do not suggest that the Respondent was obligated to create exceptions for these circumstances; we simply observe that, given the highly elastic process by which the Respondent decided which employees to fault and which employees to excuse for not meeting the production standard in any given month, it is at least possible that consideration would have been given to those circumstances had Neely not been a prominent union advocate.

[9] Loudermilk's efficiency ratings were significantly lower than Neely's for both June and July, and she had engaged in insubordinate conduct in July that, together with the failure to meet the June 80-percent performance standard, was serious enough to warrant a 3-day suspension at that time, with the notation that the next action would be "Termination." Belinda Lowe had also received a 3-day suspension—in her case, for failing to put UPC bar codes on more than 100 lamps—and the discharge notation next to her name on the sheet with June and July efficiency ratings indicated she had also engaged in "disrespectful conduct."

[10] The judge was thus well warranted in finding that Overbeck's "exaggerated effort [in his testimony] to portray [Neely's] UPC mistake as a near tragedy" was evidence that the Respondent's explanations for her termination were pretexts to conceal the discriminatory motive. Overbeck's vacillations regarding the significance of attendance records for disciplinary decisions also contributed to this impression. (See fn. 5, infra.) We note that the judge also relied on his assessment of

The Respondent's disciplinary report records have a box for "Next action if employee does not improve." On the July warning to Neely for the UPC code incident, the report states: "Depending on the severity—A severe violation *can* result in termination of employment" (emphasis added). As indicated above, nothing in the record establishes definitively that missing the monthly proficiency rating standard is a "severe" offense. Moreover, even if it were, the use of the word "can," instead of "will," suggests that even a severe offense would not inevitably result in discharge. The Respondent knew how to indicate a fixed intent to terminate for a next offense. Thus, as noted above, Loudermilk's 3-day suspension notice had listed "termination" as the next action: and a "Final written warning" notice given to employee Bridgett Williams in September 1995 for a profanity-laced altercation with a fellow employee stated, "This behavior will not be tolerated—We hope this will never happen again—If and when it does Bridgett will be terminated."[11]

In short, taking at face value the Respondent's own handbook policies and the categories in which it recorded Neely's infractions, we agree with the judge that the Respondent failed to establish that, if Neely had not been an outspoken union advocate, the Respondent still would have dealt with her previous verbal warnings and July production problem as it did when it "accelerated past the suspension step and chose discharge." Accordingly, we adopt the judge's finding that the Respondent's discharge of Neely violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Lampi LLC, Huntsville, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER BRAME, dissenting.

Contrary to my colleagues, I would reverse the judge and find that the Respondent would have discharged employee Connie Neely even in the absence of her union activities and her testimony in a prior Board proceeding. In the months before her discharge, the Respondent, as the judge found, repeatedly counselled Neely to increase her productivity and Neely failed to heed those warnings. Thus, because Neely's productivity did not improve even after she received a warning stating in part that her "next action" warranting discipline**,** if a severe violation**,** could "result in [her] termination," I find that the Respondent lawfully terminated Neely on August 5, 1996, for her overall job performance.

The Respondent hired Neely as an assembly employee in October 1993. She openly supported the Union during the organizing campaign that began in the fall of 1994. On election day, January 12, 1995, Neely wore 12 or more "Vote Yes" buttons on her blouse. The Union, after losing the election, filed objections which were consolidated for hearing with unfair labor practice charges that the Union also had filed. During the hearing in those prior cases, Neely testified that Morris Overbeck, the Respondent's operations manager, had questioned her about her union sympathies. On November 13, 1996, the Board issued its decision, at 322 NLRB 502,[1] that adopted, inter alia, the judge's finding that Overbeck coercively interrogated Neely and his recommendation to set aside the election in the representation case.

Regarding Neely's job performance, the record shows that she had received excellent annual reviews from her immediate supervisor, Virgie McKenzie, in October 1994 and October 1995**,** the latter being issued after Neely's active campaigning for the Union. McKenzie noted on both her evaluations of Neely that her efficiency rating under the Respondent's production system had exceeded 100 percent. After Neely earned an excellent production rating of 124 percent in January 1996,[2] her efficiency rating declined during the next 5 months as it fluctuated between 87 and 95 percent.[3] In May, the Respondent informed its assembly employees that beginning in June, it would require them to maintain an efficiency average of at least 90 percent. Although Neely's average for June was only 87 percent, the Respondent did not discipline any employee who maintained an 80-percent average during the first month of the new system.

McKenzie credibly testified, as the judge found, that she informally counselled Neely about 15 to 20 times between May and July urging Neely to increase her productivity. McKenzie specifically told Neely that she could improve her efficiency rating by reducing the time she spent going to the bathroom, wandering from her work station, and talking to other employees. According to McKenzie, whose testimony was credited, Neely seemed unconcerned about her declining production rating.

On July 18, the Respondent issued Neely two documented oral warnings which are not alleged as unfair labor practices. One warning was for her failure to apply the proper UPC code on two lamps that she had assem-

Overbeck's demeanor in discrediting Overbeck's testimony concerning his alleged reasons for discharging Neely.

[11] Three months later Williams was given an oral warning for excessive absenteeism. Overbeck explained this mild action on the grounds that attendance problems were viewed on a separate track from performance problems.

[1] I did not participate in the decision there as I was not a Member of the Board at the time the case issued.

[2] All dates are in 1996, unless otherwise noted.

[3] Neely's rating was 88 in February; 95 in March; 89 in April; 91 in May; and 87 in June.

bled and the other was for excessive absenteeism.[4] McKenzie stated on the production warning that, if Neely did not improve, a "severe" violation the next time "can result in termination of employment." Neely admitted that she did not take this warning seriously.

Neely's efficiency rating for July was only 68.95, by far her worst performance of the year, and below the 90-percent efficiency rating set by the Respondent. Although the Respondent made exceptions for employees who, inter alia, were new, pregnant, part-time, or working on a new product, Neely did not fall under any of the allowed exceptions. On August 5, the Respondent discharged Neely under rule 2.2.9 for overall job performance.[5] The Respondent also discharged two other employees, Belinda Lowe and Ginger Laudermilk, in early August for, inter alia, failing to meet the 90-percent production requirement.[6]

Assuming, without deciding, that the General Counsel presented a prima facie case of unlawful discharge here under *Wright Line*,[7] I find that the Respondent has established that it would have terminated Neely for cause regardless of her activities protected by the Act. Although she was once a satisfactory employee, the record shows that Neely's performance clearly had declined and continued to decline despite numerous warnings. I particularly stress the evidence that Neely's immediate supervisor, McKenzie, warned Neely between 15 to 20 times during the 3-month period before her discharge that she needed to improve her productivity. Neely's lack of concern with these warnings was clearly established. Next, on July 18, the Respondent issued Neely two warnings for job deficiencies and specifically informed her that a "severe" violation in the future could warrant her termination. Neely herself admitted at the hearing that she essentially ignored these danger signals.

Thus, when Neely, despite the Respondent's repeated admonitions, failed to meet the 90-percent production standard for July, I find that the Respondent had a legitimate business justification for discharging her.[8] The Respondent faced a situation in which Neely, for whatever reason, had lost interest in her job, failed to respond to counsellings and written warnings, and allowed her performance to continue to decline**.** In finding that Neely's discharge violated the Act, my colleagues have intimated that the Respondent, by failing to suspend Neely as it had done to Laudermilk and Lowe before discharging them at the same time as Neely, unlawfully accelerated Neely's discipline in retaliation for her union activities. There is no evidence here that the Respondent was required under its disciplinary system to suspend an employee before it could impose discharge as the culmi-

[4] Neely had previously received warnings for excessive absenteeism in both October and November 1994, and in April 1995.

[5] I note that the judge credited Neely's testimony that at her discharge interview McKenzie asked her if she had spoken with "Alice" lately. The judge found that McKenzie was referring to Alice Sullivan Young, a former union supporter who had quit the Respondent's employ, when McKenzie made this remark to Neely. Although the General Counsel alleged in the prior case that the Respondent had unlawfully disciplined Young before she voluntarily quit, the judge there dismissed that 8(a)(3) allegation and no party excepted to that finding. Nonetheless, the judge in this case intuited that, by mentioning former employee Young at Neely's discharge interview, McKenzie was implicitly informing her that "the discharge decision was made by top management and, in McKenzie's opinion, was driven by Neely's strong support for the Union, and especially by her testimony [in the prior case] against Lampi's management in the trial before Judge Metz." Because there is absolutely no evidence to support this unfounded and speculative conclusion that the judge has reached, I find, contrary to my colleagues and the judge, that McKenzie's remarks provide absolutely no grounds for the speculative finding that Neely's discharge was discriminatorily motivated.

[6] Indeed, the record shows that in August the Respondent disciplined via warnings other production employees who did not meet this standard and who had no allowable excuse for that failure.

[7] 251 NLRB 1083 (1981), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

Contrary to the judge and my colleagues, I do not find that remarks made by the Respondent's president, Heike Holderer, to a local television station at some unspecified time in August that "[w]e don't particularly like unions" and "we're against them" demonstrates the Respondent's union animus here. Holderer's statements clearly were lawful under Sec. 8(c) of the Act as the judge found, and Sec. 8(c) specifically provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be *evidence* of an unfair labor practice under any of the provisions of this Act if such expression contains no threat of reprisal or force or promise of benefit." [Emphasis added.] See *Medeco Security Locks, Inc. v. NLRB*, 142 F.3d 733, 744 (4th Cir. 1998), citing *Alpo Pet Foods, Inc. v. NLRB*, 126 F.3d 246, 252 (4th Cir. 1997) ("Speech protected by [Sec. 8(c)] cannot be used by the General Counsel to establish an employer's anti-union animus.") accord *B E & K Construction Co. v. NLRB*, 133 F.3d 1372, 1375-1377 (11th Cir. 1997); *Holo-Krome Co. v. NLRB*, 907 F.2d 1343, 1345–1347 (2d Cir. 1990), and cases cited therein

[8] On Neely's discharge paper, McKenzie stated that she knew of no reason for the "drastic change in Connie's performance." The judge found this comment to be an indication of pretext because, at the time of the discharge, Neely had just recently filed a sexual harassment claim against another employee and her mother was ill in the hospital. The judge found the Respondent was aware of both of these events; that these were personal problems "probably adversely impacting" on Neely's efficiency rating; and therefore "simply [ignoring] them and [pretending] that it did not know of any reason for Neely's low production" showed pretext. I reject this unwarranted speculation on the judge's part.

I note first that the Respondent had investigated the sexual harassment claim and, unable to substantiate either person's claim, counselled both employees on July 15. Regarding Neely's mother's illness, the record shows that she had been ill the entire time Neely had worked at the Respondent. Given these circumstances, McKenzie's failure to recount either of these events as a reason for Neely's "drastic change" in production does not rise to the level of pretext. Moreover, neither of these circumstances was the type of factor that the Respondent used in assessing Neely's production efficiency or that of any other employee as excusing poor performance. The Respondent made a business decision that employees who were pregnant, worked on new production or in new departments, were part time, were new employees, or were packers, crimpers, or those not having full control over their ability to make the production standard, would secure exemptions. It did not include exemptions for sexual harassment claims or ill relatives**,** and the General Counsel has presented no examples of employees with similar personal problems who were treated differently than Neely. In sum, there is no showing of pretext in McKenzie's comment on Neely's discharge paper.

nation of that process. Furthermore, it is well established that, if a legitimate motive was involved as occurred here, "[t]he [B]oard cannot substitute its judgment for that of the employer" and unilaterally decide what constitutes appropriate discipline because "[t]he question of proper discipline of an employee is a matter left to the discretion of the employer."[9] Based on the evidence that the Respondent had repeatedly warned Neely about improving her job performance and threatened her with discharge for a "severe" violation, I therefore conclude that the Respondent has sufficiently justified its decision to discharge Neely because of her continued overall performance.[10]

My colleagues also suggest that Neely was the victim of disparate treatment. They point to Benefield, Tuck, and Sanders as employees whom the Respondent did not discharge (though they were warned) even though they, like Neely, did not meet its production standard in July.[11] My colleagues, however, ignore the evidence that McKenzie warned Neely between 15-20 times in the months preceding Neely's discharge that she needed to accelerate her pace. There is no evidence that the Respondent similarly counseled these other employees, or that they were under the type of warning issued to Neely on July 16. Thus, the majority has not shown that Neely's situation was comparable to these other employees.

My colleagues' attempt to cast doubt on whether Neely's failure to meet its proficiency standard was a "severe" offense also misses the mark. Based on its concerns about productivity, the Respondent implemented a 90-percent production standard for employees in June, allowed them a 1-month grace period to adjust to the new system, and then began enforcement in July, as demonstrated by the discharges of Neely and her coworkers, Laudermilk and Lowe. In this context, it cannot be established that the Respondent stretched its definition of "severe" offense by concluding that Neely's failure to meet her production target constituted such an infraction.[12] Rather, the majority has substituted its judgment for the Respondent's by questioning the propriety of the decision to discharge Neely for job performance that it has effectively conceded warranted discipline.

For these reasons, I conclude that the Respondent has satisfied its burden under *Wright Line*[13] in this case when it established by a preponderance of the evidence that it would have discharged Neely even in the absence of her union activities and prior Board testimony.[14] Accordingly, I would find that the General Counsel has not demonstrated that the Respondent violated Section 8(a)(3), (4), and (1) of the Act by discharging Neely and I would dismiss the complaint in its entirety.

Karen N. Neilsen, Esq., for the General Counsel.
David C. Hagaman, Esq. (Ford & Harrison LLP), of Atlanta, Georgia, for the Respondent.
John L. Quinn, Esq. (Nakamura & Quinn), of Birmingham, Alabama, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a discharge case. Deciding in favor of the Government, I find that on August 5, 1996, Respondent Lampi unlawfully discharged Connie Neely because of her earlier strong and open support of the Union, and especially because, as a Government witness in *Lampi I***,** 322 NLRB 502 (1996), Neely gave damaging testimony against Lampi during the March 1996 unfair labor practice trial before Judge Albert A. Metz, who fully credited Neely in his decision of May 22, 1996. I order Lampi to offer full and immediate reinstatement to Neely and to make her whole, with interest.

I presided at this 3-day trial (May 6, 20, and July 9, 1997) in Huntsville, Alabama. Trial was pursuant to the March 18, 1997 complaint and notice of hearing (complaint) issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 10 of the Board. The complaint is based on a charge filed against Lampi LLC (Lampi or Respondent) on August 16, 1997 [and served 3 days later] by the International Brotherhood of Electrical Workers, AFL–CIO, Local 558 (Union or Local 558). In the Government's complaint, the General Counsel alleges that Lampi violated Section 8(a)(3), (4), and (1) of the Act by discharging Connie Neely about August 5, 1996.[1] Admitting the discharge, Lampi, by its answer, denies violating the Act. The names of Lampi and Neely appear as amended at trial.

The pleadings establish that the Board has both statutory and discretionary jurisdiction over Lampi, that Lampi is a statutory employer, and that the Union is a statutory labor organization.

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[9] *Corriveau & Routhier Cement Block v. NLRB*, 410 F.2d 347, 350 (1st Cir. 1969), citing *NLRB v. Ogle Protection Service*, 375 F.2d 497, 505 (6th Cir. 1967), cert. denied 389 U.S. 843 (1967)**;** *NLRB v. GATX Logistics, Inc.,* 160 F.3d 353 (7th Cir. 1998), and cases cited therein, at 357 ["We have observed on many occasions that courts do not sit as 'super-personnel departments' charged with deciding whether an employer's decisions were 'right' or 'wrong'; our sole mission, in the typical discrimination case, is to decide whether the employee was discharged (or subjected to other adverse action) on the basis of criteria that Congress has deemed impermissible."]

[10] See *Ona Corp.*, 270 NLRB 373, 373–376 (1984) (the Board found no 8(a)(3) violation where the employer had similarly discharged employee Smart because of his low efficiency rating).

[11] I note that the judge, even while finding a violation here, did not rely on the Respondent's failure to discharge these employees as support for his conclusion that the Respondent unlawfully terminated Neely.

[12] The majority's argument that the Personnel Policy handbook did not specify the 90-percent figure misses the point. The issue is not whether the 90-percent figure was written but whether Neely was not informed about the policy or whether it was discriminatorily enforced. The General Counsel has established neither point.

[13] Supra at fn. 7.

[14] The majority's tortured discussion of whether Neely's job performance could or would have justified her discharge under *Wright Line* begs the question of whether the Respondent lawfully discharged her. Here, the Respondent has affirmatively shown that it discharged Neely based on her continued overall performance and that this outcome would have occurred regardless of her activities protected by the Act.

[1] All dates are for 1996 unless otherwise indicated.

Five witnesses testified before me. The General Counsel called Morris Overbeck, Lampi's operations manager, and Connie Neely, the dischargee, and rested subject to production of certain documents. The Union likewise rested. (1:225–226.)[2] After additional testimony by Overbeck concerning documents produced while still the Government's witness under FRE 611(c), the General Counsel and the Union finally rested. (2:319, 322). Lampi then called Overbeck, Heike Holderer (Lampi's president), Virgie McKenzie (Neely's supervisor), Denise I. Sanders, an assembler or production operator as was Neely, and rested. (3:646.) The General Counsel called Neely in rebuttal, and Lampi recalled Overbeck for surrebuttal.

At one point I held in abeyance a ruling on Lampi's offer of its exhibits 12-17 until the General Counsel could inspect the documents. (2:382.) Later, Lampi's counsel committed to mailing copies to the Government and the Union during the second adjournment. (2:452, 457.) Apparently by oversight, Lampi failed to reoffer Respondent's Exhibits 12–17 after we resumed on the third and final day. I now receive Respondent's Exhibits 12–17 into evidence.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel, the Union, and Lampi, I make these

FINDINGS OF FACT

A. Lampi's Huntsville Operations

At its Huntsville, Alabama plant, Lampi manufactures fluorescent light fixtures of various sizes in its "mini" and "maxi" lines. The lights are consumer items sold at such stores as Home Depot and Lowe's. (1:61; 2:324, 365, 422, Overbeck. During all relevant times, Lampi employed some 90- to 100- (hourly paid) production and maintenance employees in three divisions: machine shop (press room, printing, and maintenance), assembly, and warehouse. (1:60-61; 2:324.) To meet the strong demand of its customers, while trying to cope with a tight labor market in the Huntsville area, Lampi decided to open a second shift, and did so on Monday, June 24, 1996. The initial staffing for this shift consisted of 20 employees (including Connie Neely) transferred from the day shift. Faced with employees quitting rather than work on a second shift, and in the face of Huntsville's tight labor supply, Lampi was forced to close its second shift on Friday, July 12, after operating it just 3 weeks. The second-shift employees were transferred back to the first shift. (1:12; 2:328-330, 456.) Neely was among those returning to the first shift. (1:98, 100; 2:329.)

B. Union Organizing and 322 NLRB 502

In the fall of 1994, the Union began a campaign to organize Lampi's production and maintenance employees at Huntsville. An election was held on January 12, 1995, in Case 10–RC–14568, but the Union lost by a vote of 37 to 30. The Union filed objections which were consolidated for trial with certain unfair labor practice allegations. Judge Albert A. Metz presided at the March 13–15, 1996 trial, and he issued his decision on May 22, 1996, finding certain 8(a)(1) allegations and dismissing the two 8(a)(3) allegations. On exceptions (an appeal) filed by Lampi, the Board, with some elaboration, adopted Judge Metz' decision. *Lampi, L.L.C.,* 322 NLRB 502 (1996).

There is no evidence in our case that union activity by employees continued between the January 1995 election and the March 1996 trial before Judge Metz. Nor is there any evidence of union activity among employees following the Judge Metz trial.

Before Judge Metz, Neely not only testified against Operations Manager Overbeck regarding his coercive interrogation of her in January 1995, but also in support of Alice Sullivan Young, the Union's election observer (the General Counsel unsuccessfully attacked a disciplinary warning that Lampi had issued to Sullivan, as she is referred to in Judge Metz' decision), and about a general pay increase found unlawful. (1:125, Neely.) The parties stipulated that Lampi posted the notice to employees as ordered by Judge Metz and the Board. (2:321-322.)

Neely was openly active for the Union during the preelection period (including, for example, associating with Alice Sullivan) and on the day of the election. On election day, Neely wore 12 or more "Vote Yes" buttons on the front of her blouse. (1:124, 137-140, 142). On seeing all the Union buttons on Neely's blouse that election day, Virgie McKenzie, Neely's supervisor, shook her head left to right, in the fashion expression disapproval. (1:141-143.)

The parties stipulated that President Heike Holderer was aware that Neely supported the Union as of the date of the January 12, 1995 election, and, that Neely testified on behalf of the Government at the mid-March 1996 trial before Judge Metz. (3:480.) Holderer equates Neely's testimony before Judge Metz with support of the Union. (3:475.) Neely concedes that no supervisor said anything to her about her testimony after she returned from the trial before Judge Metz. (1:125.)

Following the May 22, 1996 issuance of Judge Metz' decision, Lampi, on May 29, posted on the bulletin Board an unsigned notice, on Lampi's official letterhead, stating, in relevant part, that it would appeal Judge Metz' recommended order that a new election be held. (1:127, 129.) The only copy of the notice offered in evidence is the hand copy (G.C. Exh. 15) which Neely made. The General Counsel offered the document for the purpose of showing animus. (1:128.) As the notice clearly does not show animus, I rejected the exhibit. (1:129.) In removing General Counsel's Exhibit 15 from the Rejected Exhibits File, and placing it in the folder for the General Counsel's exhibits, I now receive General Counsel's Exhibit 15 in evidence for the limited purpose of showing the date of Lampi's posting of a notice of intent to appeal. The only relevance is to assist in fixing the dates of events.

C. Overview

Until the summer (or possibly the spring) of 1996, Connie Neely's job performance record (aside from an attendance problem) at Lampi was good. Following her October 1993 hiring at Lampi, Neely received good annual reviews from Supervisor Virgie McKenzie in October 1994 (G.C. Exh. 10) and October 1995 (G.C. Exh. 11). On both reviews McKenzie noted that Neely's efficiency exceeded 100 percent. She was promoted to a grade 8 assembly employee, the highest labor grade in the assembly division, and she was fully trained in that position. (2:326, Overbeck; 3:482, 486–488, McKenzie.) Even so, most of Neely's experience was on the mini line, rather than

[2] References to the three-volume transcript of testimony are by volume and page. Exhibits are designated G.C. Exh. for the General Counsel's, C.P. Exh. for the Union's, and R. Exh. for Respondent Lampi's.

the maxi line. (1:98, 171, 180, 208–209, Neely; 2:339-340, Overbeck.) Most of the lamps on the maxi line are larger than those on the mini line.

Along the way to 1996, Neely picked up some warnings. Attendance was a problem for her, and she received poor attendance warnings in October 1994 (R. Exh. 6, oral), November 1994 (R. Exh. 7, written), and April 1995 (R. Exh. 8, oral). Before 1996, Lampi maintained attendance records and warnings on a rolling 12-month basis. Beginning with 1996, Operations Manager Overbeck testified, Lampi switched to a calendar year basis. (2:303–304, 311-313.) Although the implication of Overbeck's description of the policy is that attendance warnings which have expired under the applicable policy (more than 12 months old under the pre-1996 policy, and after the start of a new calendar year under the 1996 policy) are not available for consideration in any future disciplinary action on that or infractions of other policies, Overbeck confirms (2:346–348) that he did rely on these old attendance warnings (R. Exhs. 6, 7, 8), as part of the "whole file," when deciding to vote for discharge.

On August 25, 1995, Neely received a documented oral warning (G.C. Exh. 14) over a safety violation. The warning apparently was for failing to keep a power wrench under control and it flipped and hit the side of Neely's head. (1:122, Neely.)

On July 18, 1996, less than a week after she returned to the first shift, Neely was given two documented oral warnings. One was for excessive absenteeism. (R. Exh. 5.) The other (G.C. Exh. 13) was for a mistake in her work (leaving the UPC bar codes off two lamps). No previous warnings are noted on either warning form, although that is true as to the previous ones, as well. The complaint does not allege a violation respecting either of these July 1996 warnings. Supervisor McKenzie noted on the production warning that a "severe" violation the next time "can result in termination of employment." Neely asserts that she does not recall this portion, even though she read the warning, and that she did not take the warning seriously because other [unnamed] employees were "doing stuff, and they wasn't getting in trouble. So I didn't, you know, I didn't think nothing about it." She then admitted that she did not know whether the other employees were receiving warnings. (1:184–185.) In fact, Belinda Lowe, who make the same error as Neely, only far more extensively (over 100 lamps), received a 3-day suspension (2:350, Overbeck), and (1:186) so told Neely.

For Neely's production efficiency, the record shows that it began to dip in 1996. After a robust 124 percent in January, it dipped to 88 percent in February, recovered some in March to 95 percent, and continued to fluctuate with an 89 percent in April, a 91 percent in May, and an 87 percent in June. (R. Exh. 9). Lampi implemented a new production system in June, going from a table group of employees to a two-person "cell" or team. Additionally, in June Lampi implemented its new production minimum of 90 percent [rule 2.2.15; G.C. Exh. 2 at 5], although for the first month, June 1996, only 80 percent was required to avoid a disciplinary warning. As Overbeck describes, several exceptions were allowed for employees who were new, pregnant, under some other medical restriction, part time, working on a new product, plus other exceptions. (1:91-92; 2:385–387.) None of the exceptions fits Neely.

Some 3 weeks after Lampi posted an unsigned May 29 notice of intent to appeal (G.C. Exh. 15), or about a week before Neely and others were transferred to the newly created second shift, a disputed incident occurred (as developed during the Union's direct examination of Neely). As the employees were working, with Neely near one end of a 30-foot mini production line, Neely observed at least three (unnamed) employees called (to the office, apparently) to receive documented warnings. At this point Neely shouted for all (about 20 or so employees) on her mini line to hear, "This is why we need a union." Standing some 20 feet from Neely, inside an adjoining room and just beyond a "door" consisting of a movable curtain of clear plastic (color photocopies are in evidence as R. Exhs. 18, 19), were President Holderer, Operations Manager Overbeck, and Supervisor McKenzie.

Neely concedes that the three managers were looking at a machine that was running and that the area was noisy. Neely believes they heard her, however, because they turned and looked at her as she shouted. She admits that none of the three ever said anything to her about her shouted remark. (1:143–149, 187–191.) For their part, the three managers deny ever hearing Neely make such a shouted remark. Nor do they admit hearing the shout but not understanding the words because of the noise, the distance, and their own conversation. None of the 20 or so employees on the mini line was called to confirm or deny the incident. No evidence was offered identifying the three (or more) employees who purportedly received warnings that day. An unanswered question is the timing of the call to the office of those warned, and the presence of Supervisor McKenzie at the time of Neely's purported shout.

I find the evidence insufficiently developed concerning Neely's asserted shout. Because of that insufficiency, I make no findings about the asserted incident.

On July 11 (just before the July 12 termination of the second shift, Neely complained to Lampi that a male employee, Sergio Rivera, was sexually harassing her. Lampi investigated but could not confirm the version of either employee. Accordingly, on July 15 Lampi issued both employees nondisciplinary counseling reports cautioning Rivera about Lampi's policy against sexual harassment, and informing Neely that false accusations are "very serious and will be disciplined." (G.C. Exh. 16; 1:179, 220–225; 2:408–409; 3:659–669.)

Neely explains that her production efficiency dropped during July 1996 for reasons other than (as the General Counsel contends) slow workers she was paired with. One of those reasons was the Sergio Rivera matter. The other was that her mother, a diabetic requiring insulin shots, was seriously ill. In fact, Neely's mother died about 1 month after Neely was fired. (1:179, 216, 220–221.)

Respecting the two July 18 warnings which Neely received, Overbeck confirms that, in weighing the option to discharge Neely, he considered the earlier absenteeism warnings as well as the July 18 attendance warning. (2:318–319, 345–348.) On the UPC bar code warning of July 18 (G.C. Exh. 13), the policy violated is stated as number 2.29. In Lampi's Personnel Policy handbook, effective June 17, 1996 (1:47, 57, 84), rule 2 covers "Work Rules." (G.C. Exh. 2 at 2). Rule 2.2.9 is the "Failure to perform a job assignment." The explanatory text reads, "An employee can be disciplined for carelessness, unsatisfactory work, or neglect of duty." Marginal notations listing the range of recommended disciplinary actions begin at a counseling, oral or written warnings, suspension or counseling, or discharge. (G.C. Exh. 2 at 4.)

Lampi's work rules contain no ground for discipline expressly labeled "overall performance." Rule 2.215, which cov-

ers "Poor Performance," provides that an employee will be allowed up to 3 months from the date of hire to come up to full performance. "Continuous poor efficiency or failure to maintain performance standards can not be tolerated. Performance is considered poor if the average monthly efficiency drops below 90%." Lampi interprets this rule as limited to efficiency ratings. (2:408, Overbeck.) Both Overbeck (1:64-65, 91, 94; 2:273, 302–303, 407–408) and McKenzie (3:617) testified that Rule 2.2.9, despite its label of failure to perform "a" job assignment, is interpreted as covering the situation of "overall performance" and that, for that situation, the employee's entire personnel file is reviewed. As Overbeck puts it, rule 2.29 is for a person who has "multiple problems." (2:303, 407–408.)

On Monday, August 5, 1996, Lampi discharged Neely under policy rule 2.2.9. (1:48, 63-65, Overbeck; 3:600, McKenzie; G.C. Exh. 6.) About 10 minutes before the end of her shift that day, Neely was called into McKenzie's office. Supervisor John Hoffman was present as a witness and, in that capacity, signed the termination paper (G.C. Exh. 6). What was said at the discharge meeting is disputed, but the discharge form, which Neely refused to sign, is not in dispute. The text provides (G.C. Exh. 6):

> Policy #2.2.9. Failure to perform job assignment
>
> | | |
> |---|---|
> | June efficiency | 86.62 |
> | July efficiency | 68.95 |

In the box for the supervisor's comments, McKenzie wrote (1:90; 3:580): "I know of no reason for the drastic change in Connie's performance. She was paired with different partners with no improvement shown."

Apparently within a few days of Neely's discharge, Neely, former coworker Belinda Lowe [also fired (2:396, Overbeck), apparently about the same time as Neely], and Heike Holderer were interviewed on camera by news reporter Max Stemple of a local television station, apparently Channel 31. After a background introduction by news anchor Heather Burns about the organizing, the election lost by the Union, and a statement that employees now say they are being fired for "the new union effort," the news clip, after showing a view of Lampi's facility, switches to the interviews (C.P. Exh. 1; 2:250; 3:471–473):

Connie Neely	Yes, I am very angry. Cause, I mean, you know, I don't understand why they tell me I'm a great employee and everything and the next thing you know, they tell me I'm fired. And I feel like . . . .
Max Stemple	Because of your involvement with the unions?
Connie Neely	Because it had to be my involvement with the unions.
Belinda Lowe	We was sitting outside on my lunch break and I just, you know, sitting outside at the picnic table and I'd start talking about the Union and I've had 1 or 2 go "Shh," and I said, "Why? You scared you gonna lose your job?"
Max Stemple	Belinda was also fired last week. We went to Lampi to confront company officials. They tell us the two both were fired after being written up numerous times for breaking company policy and that it had nothing to do with the union support. However, they say they stick by their opinion that Lampi should be a union-free business.
Heike Holderer	We don't particularly like unions. We don't feel they benefit the employees and we like to have direct interaction with our employees so we're not for the unions. We're against them.
Max Stemple	Officials at Lampi say they've already petitioned to appeal the court's ruling allowing for a new union vote. If this happens, then employees will not be allowed to vote for a union again and Lampi will remain a union-free business. Heather, this all comes down to the age-old question of whether or not a union is good for both employees and business or not.
Heather Burns	Lampi is certainly outspoken about it. We'll have to wait and see what happens. Thank you.

D .Connie Neely Discharged August 5, 1996

After Lampi implemented the new production system in June, and issued the revised Personnel Policy handbook effective June 17, 1996 (G.C. Exh. 2), Operations Manager Overbeck began meeting with the department supervisors to review the monthly efficiency reports. He distributed copies of the June report to the supervisors. In early July Overbeck, by himself, inspected the June report and made notes on his copy. [Recall that he had set a preliminary standard of only 80 percent for the first month, so that not until the first full month (July) under the new system would the handbook's 90 percent standard (rule 2.2.15) apply. (2:385, 434–435.) Overbeck also established several exemptions from the requirement to make standard, and these included exemptions for employees who were pregnant, working on new products or in new departments, part-time employees, new employees, packers, crimpers, and other not having full control over their ability to make standard.] After making notes on his own copy of the June report (G.C. Exh. 7), such as who should be warned or terminated, he called in each supervisor.

Overbeck and the supervisor went down the list discussing each person whose rating was below (for June) 80 percent. Based on their discussion, and in line with the explanations given by the supervisors for the low ratings, Overbeck revised some of his initial thoughts about the appropriate discipline. (1:71, 92-94; 2:383–389, 439–442.) For example, although Overbeck initially wrote that Patricia Collier, at 69.75 percent (G.C. Exh. 7 at 1), should be terminated, when the supervisor informed him that Collier was working on a new product in a new department, Overbeck backed off. (1:91-92; 2:387–388.) Similarly, although Overbeck initially wrote that Judith Delong, at 69.63 percent (G.C. Exh. 7 at 2) should be terminated, he relented when the supervisor advised that Delong was working in a new department. (2:391,) Connie Neely was passed by because her percentage was 86.62. (2:391; G.C. Exh. 7 at 1.)

When the July report (G.C. Exh. 8) was printed, Overbeck, in early August, went through the same process. [Recall that

this time employees had to average at least 90 percent to avoid discipline.] Overbeck marked three for discharge: Ginger Laudermilk (47.88 percent), Belinda Lowe (83.15), and Connie Neely (68.95). All three were fired. (2:392-396, 435-436.)

When Overbeck and McKenzie, during their early August meeting, came to Neely's name, Overbeck asked whether McKenzie knew why Neely's percentage had dropped. McKenzie said no because she had changed her partners and talked with her but could offer no reason for the drop. McKenzie told Overbeck that Neely did not seem to care. At Overbeck's request, McKenzie obtained Neely's personnel folder, and they went through Neely's file. They noted the prior attendance warnings and the UPC code warning. Overbeck expressed the opinion that they had no choice but to terminate, and McKenzie agreed. They then met with President Holderer and discussed the matter. Holderer reviewed the file, including the attendance warnings. In a "joint decision," the three decided that Neely should be terminated. (1:45-47; 2:341–348, 400–402, 684, Overbeck; 3:548–551, 588–590, 617, McKenzie.)

Although the accounts of Overbeck and McKenzie are essentially the same, there is one difference to note. Overbeck describes the process as one in which McKenzie made a recommendation to discharge, with which he agreed, followed by the next step of their going to Holderer where Overbeck recommended discharge, followed by Holderer's review of the file, a discussion, and a joint decision. McKenzie agrees with the joint decision concept, but strongly asserts that neither she nor Overbeck made any recommendation. She specifically denies that she went to Holderer's office with a recommendation of discharge. (3:590.) In her own brief testimony, Holderer does not address the meeting or the (joint) decision to discharge Neely.

While I credit McKenzie's different version respecting an express recommendation, she did concur with Overbeck's assessment that discharge was required. Moreover, the fact that she and Overbeck went to Holderer's office with Neely's personnel file was something more than a "Hey, boss, we've got a problem. What do you want to do?" At the very least, their trip to see Holderer implied a recommendation of discharge. The only relevance of the difference in the accounts is that McKenzie's version, particularly her specific denial that she went to Holderer's office with a recommendation of discharge, lends some support to her reference to "Alice" at the discharge meeting with Neely. (I discuss the "Alice" reference in a moment.) That is, although it is not necessary for me to ascertain the precise reasons for all the behind-the-scenes events, in that it is enough that I credit one witness or another, what likely happened is helpful to know in the credibility analysis. In this instance it appears that McKenzie had some kind of mental reservation about recommending discharge either to Overbeck or to Holderer. Nevertheless, caught in the rush of events, she concurred with Overbeck's opinion favoring termination.

There is one other difference. In McKenzie's initial description, she reports that she and Overbeck noted that Neely's personnel file had "a" poor attendance warning as well as the UPC code warning. (3:549.) Those were the two July 18 warnings. (R. Exh. 5 and G.C. Exh. 18.) Again, on cross examination (3:589), McKenzie refers to the attendance warning in the singular. (3:589, 617.) Only in describing the visit to Holderer does McKenzie use the plural, but then she uses it even as to the UPC code warning. (3:550.) The relevance of this is its bearing on the question of whether Lampi overreached when it counted—if it did—the 1994 and 1995 attendance warnings. However, Overbeck testified that, when Lampi considers discipline under rule 2.2.9, the employee's whole personnel file is reviewed. (2:273.) That is what he did with Neely's personnel file. (1:46; 2:341-348, 400-401, Overbeck; 3:589, McKenzie.) When they went to Holderer, she reviewed the "contents" of Neely's file. (3:589, McKenzie.) Nothing is ever removed (discarded) from a personnel file. (2:312, Overbeck.)

Turn now to Neely's discharge the afternoon of August 5, 1996. About 10 minutes before her shift ended that day, Neely testified, McKenzie called her into an office. Supervisor John Hoffman entered the office with the other two. As they sat down, McKenzie wasted no time. She told Neely that she was terminated effective right then. Neely asked how could they do this to her when she had not ever been suspended. McKenzie replied that [Operations Manager] Morris Overbeck said that it had to happen. Neely then said she needed to get her toolbox. Supervisor Hoffman said she could not return to the work area, and that he would get it. When Hoffman left the room, McKenzie asked Neely if she had talked to "Alice" lately. "No," Neely replied. McKenzie said she was sorry that this had to happen, but she had warned the employees that something was going to happen. Neely testified that she understood the "Alice" to be Alice Sullivan Young, and the asserted warning to be a reference to the production meeting in February when McKenzie had told the group to get their production up or go work elsewhere. (1:129–131.)

McKenzie gives a somewhat different version. Between the joint-decision meeting with Overbeck and Holderer and the discharge-meeting with Neely and Hoffman, McKenzie testified (3:551, 580581), she prepared the discharge paper (G.C. Exh. 6). That was probably the day following McKenzie's meeting with Overbeck and Holderer. (3:581-582.) Earlier I summarized the text of the paper (G.C. Exh. 6) reflecting Neely's discharge. In a space to note the "Date of previous action," the only date listed is that of July 10, 1996. McKenzie concedes that the referenced date should have been July 18, 1996 for the "UPC code violation." (3:3:553.) Recall that on July 18 Neely received two oral warnings, one for excessive absenteeism (R. Exh. 5) and the other (G.C. Exh. 13) for the UPC code violation.

According to McKenzie, when she, Hoffman, and Neely were in the office, she showed the discharge paper to Neely and explained that the efficiency percentages are compiled into a monthly report. She pointed to the percentages for June and July. "We went over that and I explained to her because of the overall performance, that we were terminating her employment. That being a combination of the poor efficiency, the UPC code violation, the bad attendance, the overall poor performance." Asked whether Neely said anything, McKenzie testified that Neely would not sign the document. McKenzie then asked if Neely wanted Supervisor Hoffman to retrieve her personal belongings from her work station. Neely said yes. When Hoffman left the office, "I told Connie that I hated that it had come to this. And then John and I walked out with her." McKenzie denies that the name of "Alice" was mentioned during the interview, denies that she asked whether Neely had seen "Alice" lately, denies referring to any warning that this would happen, and denies saying that "Morris" said it had to happen. (3:551-552.)

McKenzie (3:554), as Overbeck (2:402-403), denies that Neely's union activities or testimony before Judge Metz had anything to do with Neely's discharge. Overbeck also denies ever telling McKenzie that Neely's discharge had to happen. (2:402.)

Respecting the meeting, Neely testified more persuasively than did McKenzie, and I credit Neely. At the same time, I find it probable that McKenzie did hand the discharge paper to Neely, or place it before her, and that McKenzie referred to the efficiencies of June and July reflected on the paper. I find that McKenzie did so. Noting the reference on the discharge paper to the (intended) date of July 18, when two warnings were issued to Neely (one for attendance and the other for the UPC code violation), and to the listing of 2.2.9 on the paper, I find that McKenzie also referred to Neely's "overall performance." Even so, in light of McKenzie's description of references in the singular to the attendance warning in the file, and noting Overbeck's unpersuasive testimony that he relied on the 1994 and 1995 attendance warnings, I find that Lampi, even if it saw the earlier, and by then stale warnings of 1994 and 1995, attached no weight to them. Indeed, I find, that is why only the specific date of July 18 [as corrected at trial] is listed under previous action—Lampi itself treated the 1994 and 1995 warnings as stale even though, by Lampi's practice, nothing ever is removed from the file and discarded.

E. The Government's Prima Facie Case

1. Knowledge

Background knowledge as to Connie Neely's union sympathies and support has been described earlier. Lampi denies knowledge of any active support by Neely of the Union since her March 1996 testimony before Judge Metz. Lampi argues (Br. at 38) that knowledge of past union support does not establish that Neely still supported the Union some 4 to 5 months later. Oh, but it does. The law presumes that the existence of an established fact continues into the future unless shown otherwise. Lampi has not shown otherwise. Indeed, I find that the image of Neely's open support of the Union, and of her testimony before Judge Metz, remained as a vivid icon on the desktop screen of Lampi's memory.

2. Timing

Timing does not favor the Government. As I have found insufficient evidence regarding the asserted mid-June shout by Neely about "This is why we need a union," it is clear that the last open Union or Board-connected activity of Neely's was her March 1996 testimony before Judge Metz, and the last Union-related event of any kind, before August 5, was the May 29 posting by Lampi of its notice to employees that it intended to appeal Judge Metz' decision. Between Judge Metz' May 22 decision and Lampi's May 29 posting, and the August 5 discharge of Neely, there were intervening events.

First, Neely initially conceded that Supervisor McKenzie informally counseled her at least twice in July, after she returned from the second shift, about needing to increase her production efficiency. [Recall that on June 17 Lampi implemented its new requirement that workers must produce at an efficiency rate of at least 90 percent, although Lampi let June be a grace month in which an 80 percent rating would escape penalty. Also in June Lampi installed its new production system, switching from a group table of 10 or more employees to a two-person cell or team.] The second counseling was when Neely was part of a group being told that their production was low and that they were talking too much. (1:104–113.). On cross examination Neely concedes that, during the last month of her employment, McKenzie told her once that she needed to pick up her production. (1:162). In her October 1996 pretrial affidavit (R. Exh. 2), Neely told the Board agent that McKenzie counseled her three times. The approximate dates for such counselings are not given in the record. (1:162-165.)

Shown a note (G.C. Exh. 12), dated February 28, 1996, which she had made concerning the second counseling she admitted at trial, Neely moved the dates of the two counselings back to February. (1:115, 125–126.) Of course, it is quite possible that such counselings of employees, including with groups of employees, occur ever so often if the production reports show that the efficiency percentages are dipping. Nothing militates against the possibility of counselings in February, and then again in July. Indeed, Neely admits (1:118–119) that she, as part of a group, was orally counseled (not documented) for low productivity while she was on the second shift.

Supervisor McKenzie testified that she began in May 1996 counseling Neely to increase her productivity by reducing excessive trips to the restroom, wandering from her work station, and excessive talking, and that she so informally (and without documentation) counseled Neely 15 to 20 times from May through July. McKenzie testified that Neely did not show much concern. (3:497–499, 521–529, 596–599.) Admittedly (3:600), McKenzie never gave Neely a disciplinary warning for any of this. I credit McKenzie who testified in a believable fashion regarding this area (in contrast to Neely's confused description). In this connection, I attach some weight to the admitted fact that, as mentioned above, Neely, along with others, was counseled for low production efficiency while she was on the second shift. (1:118–119.) While Neely's 87-percent efficiency (R. Exh. 9) saved her from any discipline for June (2:391), Overbeck), fate struck hard when her July efficiency dropped (R. Exh. 9) to 69 percent.

Recall also the two July 18 warnings that Neely received, one for attendance (R. Exh. 5) and the other (G.C. Exh. 13) for not applying the correct UPC codes in marking two lamps. This type of mistake, Overbeck testified, could cost Lampi monetary penalties, and Lampi considers it a serious infraction. The warning notice advised Neely that a "severe" violation could result in her termination. (2:401–402.) As already mentioned, Neely testified that she did not take the warning seriously because other employees supposedly were breaking rules and not getting into trouble. (1:184–185.) That certainly was not so as to Belinda Lowe who, as mentioned earlier, received a suspension for the same type mistake (although far more extensive) as Neely's.

Finally, there is the incident which triggered the discharge event—the July efficiency report (G.C. Exh. 8) which showed that Neely's efficiency had dropped to 68.95 percent. I reach that matter in a moment.

3. Animus

The complaint contains no allegations of independent violations of Section 8(a)(1) of the Act, and none was litigated by implied consent. For animus the General Counsel relies on several secondary items. The first of these is the unfair labor practice findings in the prior case, including an unlawful interrogation there by Operations Manager Overbeck of the alleged discriminatee here, Connie Neely.

The Government also argues (Br. at 17–18) that animus is shown by Lampi's implied failure to comply with the Board's order that it cease maintaining a rule that employees may not discuss their pay with fellow employees. The old rule so provided, as shown at 322 NLRB 502, 504. Lampi's June 17 Personnel Policy handbook shows that the offending two sentences ["Your pay is not to be discussed among fellow employees. This discussion could result in immediate dismissal."] have been removed, leaving the following statement, as relevant, under rule "8.1. Pay is confidential" (G.C. Exh. 2 at 14):

> The amount of your pay is a confidential matter between you and the company and is disclosed by this company only to government/official offices such as taxing units etc., as required by law.

The complaint does not attack this provision. The General Counsel's argument appears to be that the quoted confidentiality statement, as it now reads, shows animus because it impliedly carries the same message as the earlier wording. The Government cites no cases for this contention, and does not even pause to advance any logical interpretation for such thought. I find no animus in the above-quoted 1996 wording.

Next, the General Counsel points to President Heike Holderer's August 1996 on-camera statements (C.P. Exh. 1) to Channel 13 that "We don't particularly like unions" and that Lampi is "against them" because they do not benefit employees and would interfere with Lampi's "direct interaction with our employees," in conjunction with Lampi's handbook position (G.C. Exh. 2 at 13):

> 7. Labor Unions
>
> This is a non-union plant.
>
> It is our desire to always remain non-union. Our goal is to maintain good working conditions, treat people fairly and run our business successfully.
>
> We feel that unions do not create jobs, increase plant effectiveness or produce products that satisfy customers. We feel that they have the opposite effect.
>
> Our main objection to Unions is that they reduce team work and harmony. Unions create a third party instead of allowing people to work together and directly with each other. Our customers prefer to buy products from a non-union plant as they have less fear of their supply being cut off due to a strike.
>
> Unions spend money to organize, thus they must recover their expenses by collecting from your pay check. Unions attempt to gain power by weakening rights and freedom of individual employees.
>
> It is much better to work together to assure individual growth, security and business success and strengthen individual rights and freedoms.

Citing no case for the Government's position, the General Counsel even fails to mention Section 8(c) of the Act. Although citing no cases, Lampi (Br. at 35) contends that Holderer's televised comments [and, although not mentioned, Lampi's handbook postion] are protected by Section 8(c). There is no merit to Lampi's argument that Holderer's comments are irrelevant because they came after Neely's discharge and do not [expressly] refer to Neely.

Lampi's handbook expression of its desire to remain a non-union plant makes no threat, and outlines the reasons for the company's position. That statement clearly is milder than the one, found to express animus, in *Stoody Co.,* 312 NLRB 1175, 1176, 1182 (1993). For example, there is no pledge here, as there, to prevent any union from coming into the plant "by every proper and legal means available."

Holderer's televised comments, however, reveal more feeling than Lampi's printed page. As Holderer flatly states on camera, "We don't particularly like unions." In fact, "We're against them." That strong feeling of opposition to unions, indeed, a dislike of unions, expresses antiunion animus. As with the expression in *Stoody,* Holderer's comments are not unlawful. Nevertheless, they reveal animus, and such animus, in the proper context, can assist in determining whether the evidence demonstrates an unlawful motivation.

Finally, the General Counsel points to the "Alice" comment assertedly made by McKenzie at Neely's discharge interview. Recall that Alice Sullivan Young was the Union's observer at the January 1995 election, and that Neely openly associated with Sullivan at the plant. Recall that, present for Neely's discharge, were Neely and supervisors McKenzie and Hoffman. Earlier I described the meeting and my crediting of Neely and, to some extent, McKenzie. Recall that when Hoffman left the room, McKenzie, as I have found, asked Neely if she had talked to "Alice" lately. "No," Neely replied. McKenzie said she was sorry that this had to happen, but she had warned the employees that something was going to happen. Neely testified that she understood the "Alice" to be Alice Sullivan Young, and the asserted warning to be a reference to the production meeting in February when McKenzie had told the group to get their production up or go work elsewhere. (1:129-131.)

What interpretation should be placed on McKenzie's reference to "Alice"? Does it mean, "Top management nailed you for supporting the Union, and especially for testifying against them before Judge Metz." Or does it mean, "Yes, you supported the Union and testified against us, and I get a kick out of this opportunity to rub your nose in the fact that a big union supporter like you is being fired, but regardless of all that, you would have been fired today anyhow because of your poor efficiency in July." What about, "I saw Alice at the mall last week and she asked about you. Have you talked with her lately?"

Of those possibilities, the most logical is the first. I find it is the message which McKenzie intended to convey. Although both the first and third are simple concepts, only the first easily fits the facts. The third might have applied if McKenzie had offered that explanation, but she denies any reference to Alice. Similarly, the second alternative, while it could fit the situation, was not offered as an explanation. Thus, McKenzie's denial that she mentioned the name of Alice eliminates the second alternative from consideration.

It might be asked, however, how does the first possibility fit the facts when, as I have found, McKenzie had given Neely informal (undocumented) counselings from May through July (excluding the 3 weeks when Neely was on the second shift) in an effort to increase her production. If McKenzie was out to "get," and "dig," Neely, why did McKenzie not simply issue her written warnings at every opportunity? The answer, I find, is that McKenzie's reference to "Alice" was not a "dig" at all, but a signal meaning that the discharge decision was made by top management and, in McKenzie's opinion, was driven by Neely's strong support for the Union, and especially by her testimony against Lampi's management in the trial before Judge Metz. Actually, determining such behind-the-scenes

events and motivations is difficult, and in this instance unnecessary. I have credited the witness who was more persuasive on a given point. Sometimes that leaves the various findings with a peculiar alignment or two.

In short, I find that Supervisor McKenzie's reference to "Alice" discloses both animus and an unlawful motivation by Lampi in the discharge of Connie Neely.

4. Disparity

In a further effort to show an unlawful motivation, the Government argues (Br. at 29–33) that, from an oral performance warning (G.C. Exh. 13) to Neely on July 18, Lampi skipped the progressive steps of a written warning, and then a suspension, and zapped Neely with a discharge because her July efficiency had dropped to 69 percent—yet all the while Lampi was retaining others, with low efficiency ratings, and issuing them warnings. Countering, Lampi argues (Br. at 36–37) that, with one exception, none were similarly situated to Neely.

Most of those named by the General Counsel fit one of the exceptions, such as pregnancy, listed by Overbeck. Curiously, all parties rely on the case of Ginger Laudermilk as showing, or disproving, disparity. Hired January 15, 1996 (G.C. Exh. 7; 1:75, 104), Laudermilk's efficiency for May was 61.18 percent (G.C. Exh. 27). After 2 straight days at a 33-percent efficiency (G.C. Exh. 27), Supervisor Laura Harbin gave Laudermilk a documented oral warning (G.C. Exh. 26a.) When Overbeck saw the June efficiency report (G.C. Exh. 7), with Laudermilk at 57.86 percent, he and the supervisor went through Laudermilk's personnel file. Finding warnings there for other matters, Overbeck decided that a final warning should issue to Laudermilk under policy rule 2.2.9. (2:390.) In fact, on July 3, Laudermilk was suspended for 3 days for four different matters: Failure to follow instructions, 2.2.9; the same being insubordination, 2.2.8; failure to wear safety glasses; and failure to meet performance [efficiency] standards, 2.2.9. (G.C. Exh. 26b.)

When Overbeck inspected the July efficiency report, and saw Laudermilk's 47.88 percent (G.C. Exh. 8 at 1), he and Supervisor John Hoffman decided that Laudermilk should be terminated under policy rule 2.2.9. (2:393-395, Overbeck.) The text of Laudermilk's August 3 discharge paper (G.C. Exh. 26c) reads very much like that of Neely's:

Policy #2.2.9.Failure to follow job assignment

June efficiency	57.86
July efficiency	47.88

In the box for the supervisor's comments, Hoffman wrote: "Have not seen any improvements of efficiency over the past few months." Laudermilk signed the report, as did Hoffman. The date by the signatures is August 5, 1996 (the same date that Neely was fired).

Lampi argues that its treatment of Neely and Laudermilk was practically identical, and in any event Overbeck (2:395) did not know whether Laudermilk supported the Union or not. The General Counsel and the Union point to the fact that Laudermilk was first suspended before she was fired, and that Neely was not given the courtesy of a "wake-up" suspension as had been extended to Laudermilk. As Laudermilk had not been employed during the union activities (and there is no evidence of union activities, open or covert, in 1996 other than the March trial), and especially as she had not testified against management before Judge Metz, as Neely had, the clear distinction between the two, and their treatment by Lampi, is Neely's protected activities. Disparity for an unlawful reason is shown.

5. Pretext

When asked the reasons for the discharge of Neely, both Operations Manager Overbeck (1:47) and Supervisor McKenzie (3:601) list three: (1) absenteeism problem, (2) severity problem (warning for UPC code mistake), and (3) poor efficiency.

As I have found, Lampi did not rely on, or give weight to, the 1994–1995 attendance warnings. Indeed, although Overbeck mentions (2:342, 400, 408) seeing the August 1995 safety warning (G.C. Exh. 14) in Neely's personnel file, it is not listed on the discharge paper either under the topic for previous warnings or under any topic for "overall performance." Instead, only the three items are listed on the discharge paper (G.C. Exh. 6), and two of those (attendance and UPC code mistake) are by reference to the July 18 [date as corrected at trial], 1996 warnings. It is those three items, I find, that Overbeck and McKenzie mean when they describe "overall performance." The August 1995 safety mistake by Neely became an afterthought for use at the trial to bolster Lampi's case. I so find.

Respecting the warning of July 18 (R. Exh. 5) for excessive absenteeism, it is clear that the attendance matter, with merely an oral warning, was not at any serious stage. Whether under the new or even the old (rolling 12-month) policy, Neely's attendance record had been cleared. That is why this step, in the progressive discipline for the attendance track, was the first step—an oral warning. To the extent that Overbeck includes this warning as part of Neely's asserted "severity problem," he overreaches. And he does so, I find, to shore up what he and Lampi perceive to be a weak case.

As for Neely's mistake of failing to put the UPC code on two lamps, at every possible turn Overbeck trumpets his opinion of the seriousness of Neely's mistake, stressing that each one could have cost Lampi a $1000 penalty. Indeed, it seems that there is even more to Neely's mistake than a mere, isolated mistake. According to Overbeck, the UPC code mistake represented a "severity problem" (1:47), a "serious offense" (2:400), indeed, a "very serious offense" (2:402). At one point, 2:408, Overbeck asserts that, of the warnings in Neely's personnel file, "two or three [were] severity warnings. So that was on overall performance." Clearly, Overbeck supposedly saw Neely as a walking "severity problem."

No one questions that the UPC code is an important matter, and that Neely made a mistake—the only documented performance mistake of her entire career at Lampi. [Trial lawyers and brain surgeons would be envious of her near-flawless job performance.] But in observing Overbeck repeatedly nail Neely to the cross over this "very serious offense," and her "severity problem" [as if Neely goofed on most everthing she did], I was reminded of the oft-quoted[3] line from the Queen's response (III, ii, 237) to Hamlet's question, as paraphrased here:

Overbeck doth protest too much methinks.

While applying the UPC code is an important matter, Neely's mistake, in light of her demonstrated competence during her nearly 3 years at Lampi, was not deemed serious enough at the time to warrant even a written warning under rule 2.1.1.2. [That rule provides for written warnings for "light" second offenses, or for "more severe" first offenses."] "Verbal" [oral] warnings, as was Neely's, are issued for "light"

[3] As, for example, in *Blue Square II,* 293 NLRB 29, 38 (1989).

offenses. Rule 2.1.1.1. (G.C. Exh. 2 at 2.) Indeed, Neely's coworker, Belinda Lowe, left the UPC code off over 100 lamps and was merely suspended rather than "industrially hanged." Overbeck's posturing at trial (2:343) that, had Neely missed applying the code to even one more light that day, "she would have been suspended or terminated," merely highlights the animus that he and Lampi have against Neely.

Overbeck's exaggerated protests of Neely's "severity problem," in light of his demeanor, convince me that, in an after-the-fact effort he is trying to convert an incident warranting a first-step oral warning into a corporate tragedy. His purpose, I find, is to add weight to what he and Lampi now perceive to be a flimsy basis for discharge. In fact, no "severity problem" is shown. Accordingly, I find that Overbeck and Lampi engaged in an exaggerated effort to portray the UPC mistake as a near-tragedy, all for the pretextual purpose of enhancing Lampi's chances for success in this proceeding.

Turn now to McKenzie's comment, at the bottom of the discharge paper (G.C. Exh. 6), about knowing of no reason for the "drastic change in Connie's performance." At trial Overbeck testified (2:410) to essentially the same by asserting, respecting Neely's work during the second shift (June 24 through July 12), that "there should have been no reason why she shouldn't have made her efficiency." Although the Government argues that Neely's efficiency score was adversely impacted by being paired with slow workers, and having to work on the maxi line when her primary experience was on the mini line, the evidence does not support the requested findings.

However, it appears that Lampi knew very well that Neely was experiencing personal problems that contributed to the decline in her production efficiency. One of these was the sexual harassment matter. The day (July 11) that Neely's production level hit bottom, at 31 percent, is the very day that Neely met with Overbeck and President Holderer to lodge her claim of sexual harassment. (2:267–270, Overbeck; G.C. Exh. 16, 23). Although, as Overbeck explains (2:269), the 30-minute down time for the meeting was not counted against Neely's efficiency score for the day, one cannot equate the nature of that problem, and its emotional truama, with a 30-minute break period which is not counted against the efficiency score. Lampi's top management (Holderer and Overbeck) had first-hand knowledge that Neely was under emotional stress.

As noted earlier in the overview section, Lampi investigated Neely's sexual harassment allegation. Unable to substantiate the version of either party, Lampi counseled both on July 15. McKenzie admits (3:575) that Holderer informed her of the allegation. Lampi also knew that Neely's 2 worst days, by far, were her 31 percent the day (July 11) she lodged her complaint, and the very next day, Friday, July 12, at 34 percent. (G.C. Exh. 5c.) It does not take the wisdom of Solomon to recognize that there probably was a connection, and to discuss the matter with Neely or to make some allowance for it. It was no accident, I find, that Lampi did neither. Thus, I find that it is falsely misleading for Overbeck, McKenzie, and Lampi to contend that they had no idea of what could have been causing Neely's July percentage to take a dip. More than that, I find that their false statements are pretextual, and made for the purpose of hiding their own knowledge in order to suggest that no reason existed that might explain the drop. This, in turn, was to justify accelerating the discipline so as to bypass a suspension and go straight to a discharge. The motive for this, I find, was to get rid of Neely because of her strong and open support of the Union, and particularly because of the damaging testimony which she gave before Judge Metz in March 1996.

Neely also was under stress because of her mother's illness. Now the mother had been ill the whole time that Neely worked at Lampi. (1:216.) Holderer knew this, for about late 1994 Holderer overruled McKenzie and excused Neely from work the next day so that Neely could be instructed on how to attach the dialysis equipment to her mother and to learn how to give the mother insulin shots. (3:650–654, 670.) During the summer of 1996, as McKenzie admits (3:529, 579), she learned from Neely that her mother was being hospitalized. Neely confirms. (3:647.) While this is some evidence that Neely would be under stress about her mother (McKenzie, in her role as a supervisor, apparently never inquired about the mother's condition after her hospitalization), there is no direct evidence that Neely ever told McKenzie that her mother's condition was deteriorating. Nor is there any direct evidence that Overbeck or Holderer was aware even that Neely's mother had been hospitalized, much less that her condition was deteriorating.

Overbeck denies (3:684) that McKenzie ever told him that Neely had told McKenzie that the mother's illness was affecting her ability to make production. Disbelieving Overbeck, whom I generally do not credit, I find that McKenzie would have told Overbeck and Holderer that Neely's mother had been hospitalized, and I further find that she did tell them. Rather than serving as a reason to confer with Neely about her mother's condition, and its possible impact on her production, that information was swept under the rug. Thus, in addition to knowing about the sexual harassment matter probably adversely impacting on Neely's efficiency rate, Lampi also knew that Neely's mother was in the hospital. As those two personal problems of Neely were inconvenient obstacles in Lampi's way of getting rid of Neely, Lampi simply ignored them and pretended that it did not know of any reason for Neely's low production. This was for the purpose of accelerating its discipline of Neely and to bypass the suspension step.

A few more words are to be said about the suspension step. Under Lampi's rule 2.1.2, suspension can be imposed for either a severe offense or a second or third offense. As mentioned earlier, discharge can be the penalty for a "third or fourth infraction, as well as a severe infraction . . . ." (G.C. Exh. 2 at 2-3.) Lampi proceeded under rule 2.2.9, which Overbeck asserts if for persons with "multiple problems." (2303, 407–408.) But on July 3 Ginger Laudermilk was given a suspension under 2.2.9, and her stated conduct (failure to follow instructions) constituted insubordination [an independent ground for discharge under rule 2.2.8], the failure to wear safety glasses, and poor efficiency. The text bluntly warns that the next action will be termination. (G.C. Exh. 26b.) Moreover, Laudermilk's insubordinate failure to follow instructions apparently had been a repeated problem, for her first warning (G.C. Exh. 26a) on May 24 also included that infraction.

Contrasted with Laudermilk's insubordinate conduct, none of Neely's infractions involved deliberate misconduct. Even if the August 1995 safety mistake (G.C. Exh. 14) is counted (something Lampi did not do until the trial), that was an isolated, accidental mistake—and Neely's only safety mistake. Similarly, Neely's mistake on the UPC code was unintentional and isolated, and the only performance mistake of her career. As the July 1996 absenteeism was the only one current in the attendance track, and the UPC code mistake the only one counted in the job performance track, Neely was not nearly the

disruptive employee that Laudermilk was stated, on the warnings, to be. And even if the August 1995 safety mistake is counted against Neely, that isolated matter does not constitute any kind of a continuing problem.

Respecting Neely's drop in efficiency, which Overbeck characterizes as a "serious" violation (2:402), Overbeck's own question, of why, reveals his awareness that Neely was capable of doing much better, and generally had done very well on production. Even if McKenzie, as asserted, told Overbeck that she had tried talking to Neely but that Neely appeared unconcerned, the overall record compels the finding, which I make, that Lampi, as it did with Ginger Laudermilk, would have given Connie Neely a "wake-up" suspension. Instead, Lampi accelerated past the suspension step and chose discharge. It did so, I find, for the unlawful reasons already described.

6. Motivation

Based on the findings I have made of unlawful animus, unlawful disparity, and pretext for an unlawful purpose, I further find that a moving reason for Lampi's August 5, 1996 discharge of Connie Neely was her openly strong support for the Union and, especially, her important testimony for the Government, and against Lampi, at the March 1996 trial before Judge Albert A. Metz.

Having found that Neely's discharge was unlawfully motivated, the question now turns to whether Lampi demonstrated that it would have fired Neely even in the absence of her union activities or her March 1996 testimony. My findings, including those of a pretextual basis for the discharge, show that Lampi has failed to carry its burden in this regard. As my findings show, absent its discriminatory motivation, Lampi would have imposed a penalty no stronger than suspension. I therefore find that, as alleged, Respondent Lampi violated Section 8(a)(3) and (4) and (1) of the Act by discharging Connie Neely on August 5, 1996. I shall order Lampi to reinstate Connie Neely and to make her whole, with interest.

CONCLUSIONS OF LAW

By discharging Connie Neely on August 5, 1996, Respondent Lampi has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (4) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Lampi LLC, its officers, agents, successors, and assigns, shall

1.Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting International Brotherhood of Electrical Workers, AFL–CIO, Local 558 (Union), or any other union, or because he or she has given testimony before the Board under the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Connie Neely full reinstatement to her former job or, if that job no longer exists, reinstatement to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Connie Neely whole for any loss of earnings and other benefits suffered as a result of the unlawful action against her, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Connie Neely, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its plant at Huntsville, Alabama copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 5, 1996, the date of the unfair labor practice found in this proceeding.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything that interferes with, restrains, or coerces you with respect to these rights, and more specifically:

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the International Brotherhood of Electrical Workers, AFL-CIO, Local 558 (Union), or any other union, or for giving testimony before the Board under the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Connie Neely full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Connie Neely whole for any loss of earnings and other benefits resulting from her unlawful discharge on August 5, 1996.

WE WILL remove from our files any reference to the unlawful discharge of Connie Neely and WE WILL inform her that this has been done and that the discharge will not be used against her in any way.

LAMPI LLC